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Required Reports and the Privilege against Self-Incrimination: A Substantive View of the Claim by Silence

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NOTES

Required Reports and the Privilege Against Self-Incrimination: A Substantive View of the Claim by Silence

Introduction

In 1927 the United States Supreme Court ruled that an individual faced with a request for disclosure of potentially incriminating information must assert the privilege against self-incrimination[1] affirmatively in order to claim its benefit.[2] In light of this "presentation requirement," Congress enacted a series of statutes requiring individuals to report their activities in criminally suspect areas. The statutes,[3] which carried criminal sanctions for failure to report,[4] were drawn so narrowly that they created an incriminating inference of criminal liability against anyone subject to the reporting requirement. Affirmatively asserting the privilege against self-incrimination would itself incriminate the individual by identifying him as subject to the reporting requirement.

The Supreme Court confronted these statutes in a series of decisions collectively called the "*Marchetti* cases."[5] Because any affirmative asser-

1. The Fifth Amendment to the United States Constitution states that no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

2. United States v. Sullivan, 274 U.S. 259 (1927), discussed *infra* at text accompanying notes 13-25. *See also* Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information,* 1966 SUP. CT. REV. 115-21. The presentation requirement enables the government to evaluate its need for the information sought and then either to grant immunity from prosecution, *see* 18 U.S.C. § 6002 (1982), allowing compulsion of the information, or to forego the information altogether. *See infra* text accompanying notes 173-175.

3. I.R.C. §§ 4401, 4411 & 4412 (1982) (wagering tax); I.R.C. § 5841 (1982) (firearm registration); 26 U.S.C.A. (I.R.C. 1939) § 2590 (1955) (codified at 26 U.S.C.A. § 4741 (1954)), *repealed by* Pub. L. No. 91-513, § 1101(b)(3)(A), 84 Stat. 1292 (1970) (marihuana transfer tax).

4. I.R.C. §§ 7202, 7203, 7262 & 7272 (1982) (wagering tax); I.R.C. §§ 5861, 5871 & 5872 (1982) (firearms registration); 26 U.S.C.A. (I.R.C. 1939) § 2590 (1955) (codified at 26 U.S.C.A. § 4744 (1954)), *repealed by* Pub. L. No. 91-513, tit. III, § 1101(b)(3)(A), 84 Stat. 1292 (1970) (marihuana transfer tax).

5. Leary v. United States, 395 U.S. 6 (1969); Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968).

tion of the privilege against these reporting requirements would itself be incriminating, the Court held in the *Marchetti* cases that the privilege protected the defendants from sanctions for failure to report even though they had not presented their self-incrimination claims to the government.[6] The *Marchetti* cases laid the basis for a presentation requirement doctrine later termed the "claim by silence" by the Burger Court.[7] Twice during the 1983 Term, in *Selective Service System v. Minnesota Public Interest Research Group*[8] and *Minnesota v. Murphy*,[9] the Court addressed the claim by silence. Both times the Court's analysis appeared to be a significant retrenchment from the Warren Court's analysis in the *Marchetti* cases. The Court appeared both to restrict the availability of the claim by silence and to redefine the nature of the presentation requirement.

This Note identifies two contrasting views of the presentation requirement and the claim by silence. Under the Burger Court's procedural view, the privilege against self-incrimination comes into play only when properly asserted. Proper assertion requires the claimant to invoke the privilege expressly when confronted by a request for possibly incriminating information. Failure to present the claim in this manner results in forfeiture of the privilege, either as a "waiver"[10] or as a failure to satisfy a procedural prerequisite.[11] The claim by silence is a narrow exception to the presentation requirement applicable only in cases factually similar to the *Marchetti* cases. Under the procedural view, the only substantive question is whether the privilege, when properly asserted, applies to protect the claimant on the particular facts.

By contrast, under the Warren Court's substantive view, an individual must present a claim of the privilege only when the government's interest in the information gained by presentation outweighs the individual's interest in avoiding the incriminating inference arising from presentation. When presentation of a claim against a narrowly drawn reporting requirement creates a strong inference of criminal liability, the governmental interests must justify the increased incrimination in order to support the presentation requirement. If the governmental interests are

6. *See infra* notes 80-90 and accompanying text.

7. Garner v. United States, 424 U.S. 648, 658 n.11 (1976). The Court's terminology is criticized *infra* at note 215 and accompanying text.

8. 104 S. Ct. 3348 (1984).

9. 465 U.S. 420 (1984).

10. The "waiver" terminology has been discredited as incorrectly implying that the claimant, with full knowledge of the presentation requirement, has intentionally and voluntarily waived his right to claim the privilege. Garner v. United States, 424 U.S. 648, 654 n.9 (1976). By contrast, under the procedural view "an individual may lose the benefit of the privilege without making a knowing and intelligent waiver." Minnesota v. Murphy, 465 U.S. 420, 425 (1984) (quoting Garner v. United States, 424 U.S. 648, 654 n.9 (1976)).

11. The most authoritative statement of the procedural view is in Garner v. United States, 424 U.S. 648 (1976), discussed *infra* at text accompanying notes 166-177.

insufficient, the presentation requirement will not lie.[12]

This Note analyzes the development of the claim by silence through the Warren Court era and then examines the Burger Court's response to the doctrine. The Note argues that the Burger Court has severely limited the applicability of the Warren Court's precedents and has adopted the procedural view. Finally, the Note concludes that the substantive view is the correct analysis of the claim by silence and that the Court's current analysis of the doctrine has several shortcomings.

I. The Developing Doctrine

A. *United States v. Sullivan*

Justice Holmes laid the groundwork for the *Marchetti* cases in 1927 with his opinion in *United States v. Sullivan*.[13] Sullivan, a bootlegger during Prohibition, had raised the privilege as a defense in his prosecution for willful failure to file a federal income tax return. He argued that the return, by requiring him to state his occupation, called for incriminating information and that the privilege protected his failure to file any return at all.[14] The Court unanimously rejected this claim, calling it an "extreme if not extravagant application of the Fifth Amendment."[15] Because only a few questions on the return required possibly incriminating responses, the privilege did not allow Sullivan to refuse to file at all and thereby to avoid responding to the majority of nonincriminating requests.

12. The importance of the governmental information interest in a given instance may be gauged by the importance of the ultimate end for which the information is used and the importance of the information in effecting that end. Mansfield, *supra* note 2, at 160. The governmental interest in the information gained from presentation of a claim of the privilege is distinct from the governmental interest in the information sought by the request. Presentation informs the government that the response may be incriminating. This information (1) identifies an individual as subject to the reporting requirement, *see Selective Serv. Sys.*, 104 S. Ct. at 3366 n.18 (Marshall, J., dissenting) ("invocation of the Fifth Amendment . . . gives the Government a different quality of information"), and (2) alerts the government that the privilege may shield the individual from responding. The latter information allows the government to weigh the importance of the information sought against the risk of not obtaining the information over the assertion of the privilege. If the information is sufficiently important, the government can compel a response by extending immunity to the individual under 18 U.S.C. § 6002 (1982). *See infra* notes 173-175 and accompanying text.

Although the governmental information interest in presentation of a claim of the privilege is distinct from the interest in the information sought, the importance of the interest in presentation depends on the importance to the government of the information sought. As the importance of the information sought increases, the importance of identifying those subject to the reporting requirement and of alerting the government to the possible bar to the information increases.

13. 274 U.S. 259 (1927).

14. Sullivan v. United States, 15 F.2d 809, 811 (4th Cir. 1926). The circuit court had agreed with Sullivan, finding the privilege a complete defense to the charge. *Id.* at 813.

15. 274 U.S. at 263-64.

Sullivan's theory troubled Justice Holmes primarily because it would deny the government the opportunity to obtain information regarding illegally earned income by the efficient self-reporting mechanism of the Revenue Act. Justice Holmes believed that Sullivan should first present his self-incrimination claim to the government before the protection of the privilege would be available.

> [I]f the defendant desired to test [any question against the privilege] he should have tested it in the return so that it could be passed upon. He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law.[16]

Since the claim by silence later developed as an exception to this rule,[17] whether the claim is procedural or substantive derives, in the first instance, from whether Justice Holmes' principle was procedural or substantive. Unfortunately, *Sullivan* leaves this question open. One interpretation of the opinion holds that presentation is a necessary procedural prerequisite to availability of the privilege. The Supreme Court read *Sullivan* this way in *Unites States v. Kahriger*:[18] "Since appellee failed to register [and accordingly failed to present his claim] . . . , it is difficult to see how he can now claim the privilege even assuming that the disclosure of violations of law is called for."[19]

At least one commentator, however, has suggested that Justice Holmes' analysis was more complex than the opinion reveals.[20] Justice Holmes concluded that Sullivan should have filed the return in full, making written claims of the privilege only in response to the specific questions he felt were incriminating.[21] Yet even this procedure is incriminating to some extent because invoking the protection of the privilege in response to a specific question implies that the correct answer is something the claimant wishes to conceal.[22] Since *Sullivan* allows this incrimination, the decision arguably stands for the substantive proposition that the government's interest in obtaining self-reported income information for revenue purposes outweighs the individual's interest in preventing the compulsion of the incrimination inherent in asserting the privilege.[23] Indeed, the government's informational interest in *Sullivan* appears to be particularly compelling: collecting revenues is a necessary governmental function, and self-reporting of income is vital to revenue

16. *Id.* at 264.

17. *See infra* text accompanying notes 63-90, 165-177.

18. 345 U.S. 22 (1953). *Kahriger* was overruled by *Marchetti,* 390 U.S. 39, 54 (1968).

19. 345 U.S. at 32.

20. Mansfield, *supra* note 2, at 117-21.

21. *Sullivan,* 274 U.S. at 263-64.

22. Mansfield, *supra* note 2, at 117. The inference is made possible by the general reporting requirement, to which an exception lies only when the response would be incriminating. *Id.* at 118.

23. *Id.* at 121.

collection.[24] In addition, the resulting invasion of the privilege is comparatively slight: the incriminating inference against Sullivan would be that he believed disclosure of his occupation would implicate him criminally. This inference serves merely to arouse the government's suspicion about Sullivan's occupation, but it does not reveal that he is a bootlegger or even a criminal.[25] Thus, *Sullivan* can be read to support either the procedural or the substantive view.

B. The Procedural View in the Wake of *Sullivan*

After *Sullivan,* Congress imposed occupational, excise or transfer taxes on individuals engaged in several specific, criminally suspect classes of activity.[26] The statutes required taxpayers to file special tax returns and to register with government officials, furnishing their names, addresses, and other identifying information.[27] In the case of the federal wagering tax, the legislation required taxpayers to post revenue stamps indicating payment[28] and directed local Internal Revenue offices to maintain lists of the taxpayers for public inspection and to provide certified copies of the lists to local prosecutors upon request.[29] A taxpayer's failure to comply with the reporting requirements carried criminal sanctions.[30] These enactments related generally to unlawful activities as to which the federal government could not exercise primary criminal jurisdiction. However, because of the perceived need to use federal power to control the activities, Congress indirectly created federal criminal jurisdiction as an incidence to its taxing power.[31]

Because the reporting requirements applied solely to specific, likely criminal groups, the mere applicability of the requirement identified a

24. *Id.*

25. *Id.* at 117.

26. *See, e.g.,* I.R.C. §§ 4401-4424 (1982) (wagering tax); I.R.C. §§ 5801-5872 (1982) (National Firearms Act); 26 U.S.C.A. (I.R.C. 1939) §§ 2590-93 (1955) (codified at 26 U.S.C.A. §§ 4741-44 (1954)), *repealed by* Pub. L. No. 91-513, § 1101(b)(3)(A), 84 Stat. 1292 (1970) (Marihuana Tax Act); *cf.* 50 U.S.C. §§ 780-826 (1982) (Subversive Activites Control Act); 18 U.S.C.A. § 1407 (1969), *repealed by* Pub. L. No. 91-513, § 1101(b)(1)(A), 84 Stat. 1292 (1970) (requiring narcotics addicts and felons to register with customs agents on leaving or entering the United States).

27. *Marchetti,* 390 U.S. at 42; *Haynes,* 390 U.S. at 88; *Leary,* 395 U.S. at 14-15.

28. I.R.C. § 6806(c) (1982).

29. 26 U.S.C.A. (I.R.C. 1939) §§ 3275, 3292 (1955) (codified at 26 U.S.C.A. § 6107 (1954)), *repealed by* Pub. L. No. 90-618, § 203(a), 82 Stat. 1235 (1968). This directive also apparently applied to the firearms tax. *Haynes,* 390 U.S. at 99-100.

30. I.R.C. §§ 7202, 7203, 7262 & 7272 (1967) (wagering tax); I.R.C. §§ 5861, 5871 & 5872 (1967) (firearms registration); 26 U.S.C.A. (I.R.C. 1939) § 2593 (1955) (codified at 26 U.S.C.A. § 4744 (1954)), *repealed by* Pub. L. No. 91-513, § 1101(b)(3)(A), 84 Stat. 1292 (1970) (marihuana tax).

31. *See Haynes,* 390 U.S. at 87-88 n.4; United States v. Kahriger, 345 U.S. 22, 27 n.3 (1953).

person as a likely criminal.[32] As a consequence, there was a strong disincentive to compliance with these schemes. Noncompliance, however, had two negative consequences: first, one became subject to criminal penalties, and second, he fell into the trap of *Sullivan*: failure to register or to file a required report became fatal to a claim of the privilege as a defense in a prosecution for noncompliance.[33]

The *Sullivan* dilemma was reinforced in *United States v. Kahriger*,[34] in which the Court upheld the federal wagering tax against a fifth amendment challenge.[35] The majority in *Kahriger* read *Sullivan* as creating a mandatory procedural rule for asserting the privilege. Significantly, however, the Court did not uphold the gambling tax solely on the basis of *Sullivan*, but found an alternative basis for its decision.[36] Whether this indicates that the majority was uncertain over the *Sullivan* rule as a purely procedural mandate is unclear. It is clear, however, that the *Kahriger* Court was divided on the majority's reading of *Sullivan*. Two dissenters—Justices Black and Douglas—would have found that the statute violated the privilege.[37] They apparently saw no procedural bars to Kahriger's claim.

Justice Jackson's concurrence in *Kahriger*[38] reveals the competing interests involved in the fifth amendment challenge to the statute, which "approache[d] the fair limits of constitutionality:"[39]

> [W]e deal here with important and contrasting values in our scheme of government, and it is important that neither be allowed to destroy the other.
>
> . . . The Fifth Amendment should not be construed to impair the taxing power conferred by the original Constitution, and especially by the Sixteenth Amendment, further than is absolutely required.
>
> . . . [A]ll taxation has a tendency . . . to discourage the activity taxed. . . .
>
> But here is a purported tax law which requires no reports and lays no tax except on specified gamblers whose calling in most states is illegal. It requires this group to step forward and identify

32. *See infra* text accompanying notes 80-84.

33. *See Marchetti*, 390 U.S. at 49; *Grosso*, 390 U.S. at 67.

34. 345 U.S. 22 (1953), *rev'd*, Marchetti v. United States, 390 U.S. 39, 54 (1968).

35. "Since appellee failed to register for the wagering tax, it is difficult to see how he can now claim the privilege even assuming that the disclosure of violations of law is called for." 345 U.S. at 32.

36. *Id.* at 32-33. The Court held that even a properly asserted claim of the privilege would fail under a doctrine holding that the privilege related only to past actions, while the disclosures related to prospective actions. This reasoning, reiterated in Lewis v. United States, 348 U.S. 419 (1955), also was repudiated in *Marchetti*, 390 U.S. at 52-54.

37. 345 U.S. 22, 36 (1953) (Black, J., with whom Douglas, J., concurred, dissenting). Justice Frankfurter dissented on different grounds. *Id.* at 37 (Frankfurter, J., dissenting).

38. 345 U.S. 22, 34 (1953) (Jackson, J., concurring).

39. *Id.* at 36.

> themselves. . . . [I]t seems to be a plan to tax out of existence the professional gambler whom it has been found impossible to prosecute out of existence.[40]

Justice Jackson's concern was with striking an accommodation between the policy of the privilege and Congress' exercise of the taxing power. In striking this balance he came close to joining Justices Black and Douglas in dissent.[41] Significantly, like the dissenters, Justice Jackson did not consider *Sullivan* to be a procedural impediment to Kahriger's claim.[42]

C. The Communist Party Cases

A majority of the Court first hinted that it was willing to depart from *Sullivan* in *Communist Party v. Subversive Activities Control Board.*[43] In that case, the Court upheld the validity of the Subversive Activities Control Act of 1950[44] against, among other constitutional attacks, a fifth amendment challenge to the Act's registration provisions.[45] The Court found that the claim was not "ripe" because every condition precedent to the duty to register had not yet occurred, and because the Communist Party, rather than the affected individuals, raised the privilege.[46]

Yet, after stating this holding, the Court went on to suggest that, even though the Communist Party had not registered and thus had not presented its claim of the privilege under *Sullivan,* it might distinguish *Sullivan* and find the privilege properly asserted in the circumstances of registration under the Act.[47] The Court stated that registration under the Act may constitute a more serious invasion of the privilege than had occurred in *Sullivan*: "the obligation to file a registration statement compels a few particular individuals to come forward, identify themselves, and to suggest, at least, their connection with a relatively limited poten-

40. *Id.* at 34-35.

41. Justice Jackson stated in *Kahriger,* "I concur . . ., but with such doubt that if the minority agreed upon an opinion which did not impair legitimate use of the taxing power I would probably join it." *Id.* at 34.

42. Justice Jackson concurred in the judgment not because he agreed with the majority's reading of *Sullivan,* but because he feared the long-term consequences of "[t]he evil of a judicial decision impairing the legitimate taxing power by extreme constitutional interpretations." *Id.* at 36.

43. 367 U.S. 1 (1961).

44. 50 U.S.C. §§ 781-826 (1982).

45. 50 U.S.C.A. § 786(a), (c) (1951), *repealed by* Pub. L. No. 90-237, § 5, 81 Stat. 766 (1968) (requiring the Communist Party's officers to register as such with the United States Attorney General).

46. 367 U.S. at 105-07; *cf.* K. RIPPLE, CONSTITUTIONAL LITIGATION 89 (1984) (ripeness analysis).

47. 367 U.S. at 108.

tial sphere of criminal conduct."[48] In addition, the Court hinted that the government's interest in the presentation of a claim may be weaker under the Act than in *Sullivan*. In *Sullivan,* because only a few questions on the return sought possibly incriminating responses, presenting the claim to each specific incriminating question permitted the government to obtain most of the information sought. By contrast, in *Communist Party* "any claim of the privilege would involve the withholding of all information"[49] from the government; as a result, the presentation requirement would serve no purpose.

Four years later the unanimous Court in *Albertson v. Subversive Activities Control Board*[50] carried out its earlier suggestion, finding provisions similar to those in *Communist Party*[51] unconstitutional under the Fifth Amendment. The Attorney General had determined that the petitioners in *Albertson* were members of the Communist Party and obtained orders from the Subversive Activities Control Board requiring them to register.[52] The petitioners claimed the privilege as a defense to the issuance of registration orders, which clearly presented a *Sullivan* issue. Under *Sullivan* as construed in *Kahriger,* the petitioners' failure to submit any registration statement should have defeated their claims.

Writing for the majority, however, Justice Brennan went directly to the substantive incrimination issue, finding the registration requirement "inconsistent"[53] with the privilege because it "require[d] an admission of membership in the Communist Party," as to which "mere association . . . presents sufficient threat of prosecution to support a claim of privilege."[54] The Court then examined *Sullivan* in response to the government's argument "that petitioners might answer some questions and appropriately claim the privilege on the form as to others, but cannot fail to submit a registration statement altogether."[55] The Court read *Sulli-*

48. *Id.* at 108-09.

49. *Id.* at 109.

50. 382 U.S. 70 (1965) (White, J., not participating; Black and Clark, JJ., joining in the majority opinion and concurring separately).

51. 50 U.S.C.A. § 787(a), (c) (1951), *repealed by* Pub. L. No. 90-237, § 5, 81 Stat. 766 (1968). *Communist Party* had involved 50 U.S.C.A. § 786(a), (c) (1951). See *supra* note 45 and accompanying text.

52. 382 U.S. at 71-73. *See* 50 U.S.C.A. § 792(a) (1951). The orders were affirmed in Albertson v. Subversive Activites Control Bd., 332 F.2d 317 (D.C. Cir. 1964).

53. 382 U.S. at 78.

54. *Id.* at 77. The form, reproduced as an appendix to the opinion, *id.* at 82, had five blank spaces, three calling for the registrant's name, one calling for his address and one seeking the name of the Communist organization of which the registrant was a member. The Act also required an accompanying registration statement, reproduced at 382 U.S. at 83-85. Completion of any of these requests would have incriminated the respondent by necessarily linking him with the Communist Party. The Court premised its analysis on the assumption that "nothing in the Act or regulations permits less than literal and full compliance with the requirements of the form." *Id.* at 78.

55. *Id.*

van as standing for two propositions: (1) claiming the privilege in response to every request for information on an income tax return is "virtually frivolous,"[56] and (2) some tribunal, rather than the taxpayer, must be the "final arbiter of the merits of the claim."[57] Based on this reading, the Court found the first proposition inapposite to the registration statement, which had a pervasively incriminating effect, thus substantiating the claim of privilege.[58] Further, the petitioners' presentation of their claims to the Control Board had satisfied the second *Sullivan* requirement.[59]

Significantly, the Court in *Albertson* did not consider *Sullivan* in the context of a procedural difficulty with the petitioners' claim. Indeed, aside from a ripeness issue,[60] the Court found no difficulty at all with the self-incrimination claim. Under *Sullivan* and *Kahriger,* the Court could have chosen to require presentation of the privilege on the registration form in response to specific incriminating questions before considering the fifth amendment issue properly presented. That the Court unanimously bypassed this option reveals a remarkable shift in its approach to *Sullivan* and to the privilege. As one commentator observed at the time:

> It seems clear that *Albertson* stands at the threshold of an effort by the Court to reexamine [*Sullivan, Kahriger* and *Lewis v. United States*[61]], perhaps in the hope of rationalizing them more successfully, perhaps with the thought that changed notions of the privilege that have emerged in various contexts must now be brought to bear on the problems raised by these older cases. The result may be that relatively more weight will be given to the policy of the privilege as against the government's need for information.[62]

II. Adoption of the Substantive View

A. The *Marchetti* Cases

After *Albertson,* the Court heard four appeals addressing attacks against the *Sullivan* presentation rule. These cases involved fifth amendment challenges to four different federal reporting statutes aimed at specific groups. The Court granted certiorari in *Marchetti v. United States* to determine whether it should overrule *Kahriger.*[63] Marchetti had been convicted of willful failure to register and pay the federal occupational

56. *Id.* at 79.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 74-77.
61. Lewis v. United States, 348 U.S. 419 (1955); *see supra* note 36.
62. Mansfield, *supra* note 2, at 116.
63. 385 U.S. 1000 (1967). The Court in *Marchetti* also granted certiorari to reexamine the "future acts" doctrine established in Lewis v. United States, 348 U.S. 419 (1955). The *Marchetti* Court subsequently overruled *Lewis.* 390 U.S. at 52-54.

tax on wagering.[64] A Second Circuit panel had upheld the conviction against his argument that the wagering tax violated the Fifth Amendment.[65] As a companion case to *Marchetti,* in *Grosso v. United States*[66] the Court reviewed a conviction for conspiracy to evade[67] and willful failure to report and pay excise taxes[68] under the wagering tax scheme. Grosso had raised the privilege as a defense at trial, as grounds for acquittal after trial and as grounds for a new trial.[69]

Along with these cases the Court in *Haynes v. United States*[70] reviewed a conviction under the National Firearms Act[71] for possession of an unregistered firearm. Registration was required primarily of persons who obtained possession of weapons in violation of the Act and, as a result, were subject to prosecution.[72] Haynes had moved for dismissal before trial on fifth amendment grounds and pled guilty when the motion was denied.[73] None of the defendants in these cases had tendered payment of the taxes imposed or remitted any required reports or registration.[74]

Although decided in the Term following *Marchetti, Leary v. United States*[75] contained reasoning that was virtually identical to that in the *Marchetti* trilogy. Timothy Leary[76] had been convicted of knowingly transporting and concealing marihuana without having paid the transfer tax imposed by the Marihuana Tax Act.[77] Although not so charged, Leary also apparently failed to comply with the Act's registration provisions,[78] which were modelled partly on the National Firearms Act at

64. I.R.C. §§ 4411, 4412 (1982), discussed *supra* at text accompanying notes 26-33.

65. United States v. Costello, 352 F.2d 848, 851 (2d Cir. 1965).

66. 390 U.S. 62 (1968).

67. 18 U.S.C. § 371 (1982). The conspiracy conviction, although reversed, 390 U.S. at 70, is not pertinent to this discussion.

68. I.R.C. § 4401 (1982).

69. 390 U.S. at 63.

70. 390 U.S. 85 (1968).

71. I.R.C. § 5861 (1982) (making possession illegal); I.R.C. § 5841 (1982) (statutory requirement of registration).

72. 390 U.S. at 96.

73. *Id.* at 86-87.

74. *See Marchetti,* 390 U.S. at 40-42; *Grosso,* 390 U.S. at 63; *Haynes,* 390 U.S. at 86.

75. 395 U.S. 6 (1969).

76. Leary was notorious in the late 1960's as an advocate of the hallucinogenic drug LSD. *See* MARQUIS WHO'S WHO INC., 2 WHO'S WHO IN AMERICA 1922 (43d ed. 1984).

77. 26 U.S.C.A. (I.R.C. 1939) § 2590(a), (b) (1955) (codified at 26 U.S.C.A. § 4741 (1954)) imposed a transfer tax on all transfers of marihuana. 26 U.S.C.A. (I.R.C. 1939) § 2593 (1955) (codified at 26 U.S.C.A. § 4744 (1954)), under which Leary was convicted, imposed criminal sanctions on persons who transported or concealed marihuana without having paid the transfer tax. The Marihuana Tax Act has been repealed since *Leary.* Pub. L. No. 91-513, § 1101(b)(3)(A), 84 Stat. 1292 (1970).

78. 26 U.S.C.A. (I.R.C. 1939) §§ 2591, 3231 (1955) (codified at 26 U.S.C.A. §§ 4742, 4753 (1954)), *repealed by* Pub. L. No. 91-513, § 1101(b)(3)(A), 84 Stat. 1292 (1970).

issue in *Haynes*.[79]

Justice Harlan, who wrote the Court's opinion in all four decisions, concluded that the requirements of the taxing schemes unconstitutionally compelled self-incriminating information. The taxed activities generally were illegal under the laws of most states,[80] and the solicited information was readily available for use by local prosecutors.[81] Any submission of information or payment of tax necessarily would identify the taxpayer as a participant in the taxed activity.[82] In *Grosso* the Court stated: "The return is expressly designed for the use only of those engaged in the wagering business; its *submission,* and the replies demanded by *each* of its questions, evidence in the most direct fashion the fact of the taxpayer's wagering activities."[83] As a result, the statutes violated the Fifth Amendment, and the privilege would protect the petitioners unless they were "foreclosed from asserting the constitutional privilege."[84]

Justice Harlan next considered the claims in light of *Kahriger*.[85] In *Marchetti*, the Court, relying on *Albertson,* stated that *Kahriger* rested on the twin concerns evident in *Sullivan*: (1) preventing frivolous claims, and (2) having a tribunal, rather than the taxpayer, determine the merits of a claim.[86] The Court reasoned that neither concern was sufficient to defeat Marchetti's claim. First, Marchetti's assertion was far from frivolous. Second, the latter concern was "unpersuasive in this situation."[87]

> [E]very element of these requirements would have served to incriminate petitioner; to have required him to present his claim to Treasury officers would have obliged him 'to prove guilt to avoid admitting it.' . . . In these circumstances, we cannot conclude that his failure to assert the privilege to Treasury officials at the moment the tax payments were due irretrievably abandoned his constitutional protection. Petitioner is under sentence for violation of statutory requirements which he consistently asserted at and after

79. 395 U.S. at 15-16.

80. *See Leary,* 395 U.S. at 16-18; *Marchetti,* 390 U.S. at 44-47; *Grosso,* 390 U.S. at 64.

81. *See Marchetti,* 390 U.S. at 47-48; *Grosso,* 390 U.S. at 66.

82. "*[E]very portion* of these requirements had the direct and unmistakable consequence of incriminating petitioner . . . ." *Marchetti,* 390 U.S. at 49 (emphasis added).

83. 390 U.S. at 65 (emphasis added). In *Haynes* the Court stated that "the correlation between obligations to register and violations can only be regarded as exceedingly high, and a prospective registrant realistically can expect that registration will substantially increase the likelihood of his prosecution." 390 U.S. at 97.

84. 390 U.S. at 67.

85. *Kahriger* was a directly applicable precedent with respect to Marchetti's assertion of the privilege. 390 U.S. at 49-50. However, Grosso's claim involved a provision of the wagering tax not addressed in *Kahriger,* and hence *Kahriger* was not deemed controlling. 390 U.S. at 67 n.5. Nor was *Kahriger* applicable to *Haynes,* a firearms case. The Court in *Marchetti* also reexamined its decision in Lewis v. United States, 348 U.S. 419 (1955), which involved issues not relevant here. *See supra* note 36.

86. 390 U.S. at 50.

87. *Id.*

trial to be unconstitutional; no more can here be required.[88]

In these circumstances, there was no policy basis for denying the protection of the privilege. Accordingly, the *Marchetti* Court overruled *Karhriger.*[89] Finally, the Court found that Marchetti, Grosso, Haynes and Leary all had properly asserted their claims and that the privilege provided a complete defense in their prosecutions.[90]

The Court did not question the validity of *Sullivan,* but found it to be unpersuasive precedent in the *Marchetti* cases. Consequently, after the *Marchetti* cases, fifth amendment jurisprudence distinguished the federal income tax from the federal wagering tax, marihuana tax and firearms registration. With respect to federal income tax returns, most requests for information were not so incriminating as to be unjustified; hence, a total failure to file a return on grounds of self-incrimination was frivolous, and the taxpayer was not permitted to be the final arbiter of his own claim of privilege.[91] Yet with respect to the wagering tax, the marihuana tax, and firearms registration, submitting any information necessarily implied that the respondent was engaged in criminally suspect activities, whether legal or not. Under the *Marchetti* cases, the privilege protected the respondent from prosecutions for failure to file or register without regard to whether the proper tribunal passed on the claim.

There was, however, no theory or unifying principle to explain the different results in these cases. In the *Marchetti* cases, Justice Harlan may have relied on the inequity of the impossible dilemma created by *Kahriger:* If *Sullivan* required presentation to assert the privilege properly, yet every element of the wagering tax sought incriminating information, a taxpayer faced the choice of either "prov[ing] guilt to avoid admitting it"[92] or losing any benefit from the privilege because he chose not to assert it properly. This concern, however, does not appear to supply an adequate unifying principle. At most it explains the results in the *Marchetti* cases: when a statutory scheme makes it logically impossible for an individual to assert the privilege without thereby incriminating himself, the claim need not be presented. But this rationale alone does not explain the result in *Sullivan* or provide an analysis for other cases which may fall between *Sullivan* and the *Marchetti* cases.

Justice Brennan, concurring in *Marchetti* and *Grosso,*[93] advanced an

88. *Id.* at 50-51 (quoting United States v. Kahriger, 345 U.S. 22, 34 (1953) (Jackson, J., concurring)).

89. *Kahriger* was also overruled on grounds not relevant here. *See* 390 U.S. at 52-54; *see also supra* note 36.

90. *Marchetti,* 390 U.S. at 60-61; *Grosso,* 390 U.S. at 67, 71; *Haynes,* 390 U.S. at 100; *Leary,* 395 U.S. at 27.

91. *See Albertson,* 382 U.S. at 79.

92. 390 U.S. at 50 (quoting United States v. Kahriger, 345 U.S. 22, 34 (1953) (Jackson, J., concurring)).

93. 390 U.S. 62, 72 (1968) (Brennan, J., concurring).

alternate principle, that a statute violates the privilege when it "clearly evidences the purpose of gathering information from citizens in order to secure their conviction of crime."[94] This principle also appears ill-suited to serve as a general rule in these cases.[95] First, by focusing on statutory purpose, it would require an inquiry into the apparent purposes of each statute examined—an uncertain task at best. More fundamentally, such an inquiry would seem to disregard the essence of a claim of the privilege: whether the government has compelled self-incrimination. This determination should turn on the effect of a statute rather than on its purposes.[96]

B. Implications of the *Marchetti* Cases

In the *Marchetti* cases, the Court took drastic measures to protect the policies underlying the privilege against self-incrimination, including overruling its sixteen-year-old decision in *Kahriger* and its more recent decision in *Lewis v. United States*.[97] The Court's rejection of *Kahriger* rested in part on its rejection of *Kahriger*'s rote application of *Sullivan* to defeat the privilege without any consideration of the merits of the claim.[98] The Court also apparently limited the scope of the *Sullivan* rule, extending the protection of the privilege to four individuals who had never submitted required information and had not raised the privilege until their prosecutions. More importantly, the Court found that the claimants had *properly asserted* the privilege in the circumstances of each case.[99]

The *Marchetti* cases contain a common fact pattern. Each of the statutes was tailored so that the requirement to register or to report fell exclusively on a class composed largely of persons threatened with criminal liability under some other law.[100] As the Court emphasized in

94. 390 U.S. at 73.

95. *But cf.* text accompanying notes 139-142, where the governmental purpose is considered as an element of the government's informational interest.

96. Justice Harlan's opinions in *Marchetti, Grosso,* and *Haynes* concentrate on the incriminatory *effect* of the statutory schemes, to the exclusion of the legislative purpose. *See Marchetti,* 390 U.S. at 42-48; *Grosso,* 390 U.S. at 64-65; *Haynes,* 390 U.S. at 87-90, 95-97.

97. 348 U.S. 419 (1955); *see supra* note 36.

98. *See Marchetti,* 390 U.S. at 50; *see also supra* notes 85-90 and accompanying text.

99. *Marchetti,* 390 U.S. at 60; *Grosso,* 390 U.S. at 67; *Haynes,* 390 U.S. at 100; *Leary,* 395 U.S. at 29.

100. The privilege does not protect against the compulsion inherent in the legal obligation to do an act; it generally protects only against the dilemma posed by a compulsion to perform an act when performing that act would create a risk of prosecution for a separate criminal offense. For instance, in *Marchetti* the privilege protected against the dilemma of risking prosecution for failure to file the wagering tax return or of risking prosecution for illegal gambling activities on filing the return. 390 U.S. at 48-49. By contrast, in United States v. Toussie, 410 F.2d 1156, 1159-60 (2d Cir. 1969), the privilege did not protect the defendant from prosecution for failure to register for the selective service when registration did not entail a risk of prosecution for any other criminal offense. *See* Comment, *Conditioning Financial Aid on Draft*

Haynes, the classes were not composed *entirely* of likely criminals;[101] it sufficed that the class was a " 'selective group inherently suspect of criminal activities.' "[102] In these circumstances, the Court found a legally enforced reporting requirement to constitute compelled self-incrimination.

This determination followed from a chain of inferences based on two assumptions: (1) only persons required to file the reports would in fact file, and (2) persons reporting that they are members of a criminally suspect class are incriminated.[103] The assumptions in this reasoning appear to be sound. The first assumption would be false if a person to whom a reporting requirement did not apply voluntarily filed a report. This is not likely to occur, especially in the context of the statutes at issue in the *Marchetti* decisions, because no reasonable person would voluntarily file, for example, a wagering tax return. The second assumption derives from the traditional criterion of what constitutes "incrimination." Information is incriminating if it is "available to prosecuting authorities"[104] and would "prove a significant 'link in a chain' of evidence tending to establish . . . guilt."[105]

Two other aspects of the Court's analysis are significant. First, the Court's reasoning does not rely on the fact that the *Marchetti* cases involved uses of the taxing power. This suggests that the reasoning in the *Marchetti* cases should apply equally to tax and nontax cases. Indeed, the antecedent of these decisions, *Albertson,*[106] involved a statute providing for national security.[107] Second, the *Marchetti* analysis does not require a claimant to show that compliance necessarily will identify him as having engaged in criminal activities. The analysis requires the claimant

Registration: A Bill of Attainder and Fifth Amendment Analysis, 84 COLUM. L. REV. 775, 796 n.143 (1984).

101. 390 U.S. at 96-97.

102. *Leary,* 395 U.S. at 18.

103. Justice Harlan's reasoning in the *Marchetti* cases was as follows. First, assuming that any compliance with a mandatory reporting requirement necessarily implies that the person reporting is a member of the class required to report, once it has been determined that a particular report is required only of a criminally suspect class, then any compliance with the reporting requirement necessarily implies that the person reporting is a member of a criminally suspect class. Second, assuming that any person who must report that he is a member of a criminally suspect class is incriminated, if the person reporting is a member of a criminally suspect class, then the person reporting is incriminated. The reasoning is set out in *Leary,* 395 U.S. at 18.

104. *See* 390 U.S. at 48-49.

105. *Id.* (footnotes omitted) (quoting a metaphor used by Chief Justice Marshall in *United States v. Burr, In re* Willie, 25 F. Cas. 38, 40 (D. Va. 1807) (No. 14,692e)). *See also* Hoffman v. United States, 341 U.S. 479, 486 (1951) ("The Privilege . . . extends to answers . . . which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.").

106. 382 U.S. 70 (1965), discussed *supra* at text accompanying notes 50-62.

107. 50 U.S.C.A. § 787(a), (c) (1951), *repealed by* Pub. L. No. 90-237, § 5, 81 Stat. 766 (1968).

only to show that he is a member of a criminally suspect class.[108] For a class to be "criminally suspect" it is necessary that a significant number of persons in the class have violated the law, but this does not require that every member of the class, including the claimant, be a criminal.[109]

C. Articulating the Substantive View

1. The Policy of the Privilege

A comparison of *Sullivan* with the *Marchetti* cases reveals a significant difference that relates to the strength, or clarity, of the incriminating inferences created by compliance with the reporting requirements. If Sullivan had complied with Justice Holmes' requirement of asserting the privilege in response to particular inquiries on the income tax return and then submitting it to the government, he would have incriminated himself to some extent.[110] One may reasonably have inferred that Sullivan feared exposure to criminal liability if he accurately responded to a question rather than assert the privilege. Yet, in light of the *Sullivan* decision, this inference must be constitutionally permissible.

The difference between the incriminating inferences in *Sullivan* and in the *Marchetti* cases seems to be one of degree: the inferences are much stronger in the *Marchetti* cases. Justice Brennan in *Albertson* anticipated the distinction:

> In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime.[111]

A person's claim of the privilege in response to an inquiry into his occupation ordinarily implies nothing more than his awareness of the incriminating tendency of the true response.[112] Although this may attract a prosecutor's attention, perhaps leading to an investigation for possible criminal activity, the inference does not incriminate the claimant with particularity: it does not reveal him to be a drug dealer, a gambler, or a

108. *See Leary,* 395 U.S. at 18.

109. This consequence is not surprising because the privilege has often been described as a protection to the innocent as well as a shelter to the guilty. *See, e.g.,* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964); Quinn v. United States, 349 U.S. 155, 162 (1955). The privilege against self-incrimination guards against the risk of criminal *prosecution,* not the risk of a guilty verdict.

110. Mansfield, *supra* note 2, at 117.

111. 382 U.S. at 79.

112. The inference arises from the fact that a claim of the privilege lies only when the true response would tend to be incriminating.

thief. The burden of unearthing criminal facts, if any exist, rests entirely with the prosecutor. The privilege protects the taxpayer against use of the claim on the return as evidence at trial, but it has never extended to prevent a prosecutor from drawing the incriminating inference that follows naturally from the assertion of the privilege.[113] Thus, the taxpayer in the *Sullivan* situation must incriminate himself only to the extent of providing the government a possible clue to his activities.

By contrast, the taxpayer who merely puts his name on one of the forms involved in *Albertson* or the *Marchetti* cases—regardless of whether he provides any other information or asserts the privilege against self-incrimination—necessarily identifies himself as a member of a targeted, criminally suspect class. More than drawing a prosecutor's attention, such an identification significantly eases the prosecutorial burden. The investigation becomes, for example, whether the taxpayer is an *illegal* gambler, not whether he is a gambler at all. Furthermore, even if the report carries a claim of the privilege on its face, a prosecutor could discard the portion of the report containing the claim and submit the remainder in evidence. Presumably, the fact that the individual placed his name on a form directed at a criminally suspect class would create a permissible evidentiary inference of guilt.[114] The fact that the taxpayer provided his name on the form without asserting the privilege, thus losing or waiving the privilege as to this information, may refute any argument that the return is used in derogation of the assertion of the privilege.[115] In this sense the person in the *Marchetti* dilemma risks a more injurious and conclusive incriminating inference than in *Sullivan*.

The strength of the incriminating inference became a focal point of the Court's analysis in *California v. Byers*,[116] decided three years after *Marchetti*. Byers was convicted of violating California's "hit and run" statute, which required drivers of automobiles involved in traffic accidents causing property damage to stop and identify themselves to the owner of the damaged property.[117] Byers refused to stop after he was in an accident and then claimed the privilege as a defense in his prosecution under the statute. The Court reversed the California Supreme Court and held that Byers' prosecution did not violate his privilege against self-incrimination.[118]

113. *See, e.g.*, Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 104 S. Ct. 3348, 3366 n.18 (1984) (Marshall, J., dissenting) ("Of course, the Government can always draw an incriminating inference when a person claims a Fifth Amendment privilege.").

114. *See* Mansfield, *supra* note 2, at 117.

115. *See* Garner v. United States, 424 U.S. 648, 650 (1976).

116. 402 U.S. 424 (1971).

117. CAL. VEH. CODE § 20002(a)(1) (West 1986). Violations of this section carried a punishment of up to six months imprisonment and a fine of up to $500. *Byers*, 402 U.S. at 426 n.1.

118. 402 U.S. at 427 (plurality opinion); 402 U.S. at 458 (Harlan, J., concurring in the judgment).

Chief Justice Burger, writing for four justices, concluded that California's reporting requirement did not create a substantial inference of criminal liability.[119] He reasoned that the statute applied to "all persons who drive automobiles in California,"[120] a class that is not "either 'highly selective' or 'inherently suspect of criminal activities.' "[121] Because there was no substantial incriminating inference, the statute did not implicate the privilege.

The five other members of the *Byers* Court disagreed with the plurality and concluded that the hit and run statute created a substantial incriminating inference. Justice Harlan viewed this issue not as whether Byers was a member of an " 'inherently-suspect-class' ";[122] that label was relevant only "as an indicium of genuine incriminating risk."[123] Instead, the inquiry was whether compliance with the statute would create an incriminating inference of criminal liability. Justice Harlan agreed with the California Supreme Court that the reporting requirement was incriminating: "[T]he widespread prevalence of criminal sanctions as a means of regulating driving [casts] a substantial shadow of suspicion over the class."[124] Justice Harlan joined in the plurality's judgment, however, because he concluded that the state's legitimate interests outweighed the risk of incrimination created by the statute.[125]

Justices Black and Brennan filed dissenting opinions in which they echoed Justice Harlan's analysis of the incriminating inference. Both justices argued that the relevant class created under the statute was not, as the plurality claimed, the class of automobile drivers in California. The correct class was composed of California drivers involved in accidents causing property damage.[126] According to Justice Black, individuals in this class are "very likely to have violated one of the hundreds of state criminal statutes regulating automobiles which constitute most of two

119. 402 U.S. at 431 ("[D]isclosures with respect to automobile accidents simply do not entail the kind of substantial risk of self-incrimination involved in *Marchetti*, *Grosso*, and *Haynes*."). Chief Justice Burger also based his decision on the alternative ground that the statute's requirement that drivers stop at the scene of an accident was "nontestimonial" and was not protected by the privilege against self-incrimination. *Id.* at 432-33; *see generally* Schmerber v. California, 384 U.S. 757 (1966) (privilege does not prevent use of compelled nontestimonial disclosures). This alternative basis for the plurality opinion was soundly rejected by a majority of the Court in *Byers*. 402 U.S. at 435-36 (Harlan, J., concurring in the judgment); 402 U.S. at 462-63 (Black, J., joined by Douglas and Brennan, JJ., dissenting); 402 U.S. at 472-73 (Brennan, J., joined by Douglas and Marshall, JJ., dissenting).

120. 402 U.S. at 430.

121. *Id.* at 431. Chief Justice Burger added that "No empirical data are suggested in support of the conclusion that there is a relevant correlation between being a driver and criminal prosecution of drivers." *Id.*

122. 402 U.S. at 438 (Harlan, J., concurring in the judgment).

123. *Id.*

124. *Id.*

125. *Id.* at 448-58. *See infra* notes 151-161 and accompanying text.

126. 402 U.S. at 461 (Black, J., dissenting); 402 U.S. at 470 n.6 (Brennan, J., dissenting).

volumes of the California Code."[127]

Justice Brennan objected to the plurality's "misunderstanding"[128] of the inherently suspect class language:

> The plurality seems to believe that membership in such a suspect group is somehow an indispensable foundation for any Fifth Amendment claim. Of course, this is not so, unless the plurality is now prepared to assume that [past self-incrimination decisions by the Court] were based . . . upon the unarticulated premises that bankrupts, businessmen, policemen, and lawyers are all "group[s] inherently suspect of criminal activities."[129]

Instead, Justice Brennan drew on *Albertson* and *Marchetti* to argue that the relevant inquiry was whether identifying California drivers involved in accidents causing property damage would create an inference of criminal liability.[130] In Justice Brennan's view, the state's interests in the hit and run statute did not justify the strong incriminating inference created by the reporting requirement.[131]

2. *The Government's Informational Interest*

Another distinction between *Sullivan* and the *Marchetti* cases is the nature of the governmental information interest in each case. This distinction provided the basis for Justice Brennan's concurrences in *Marchetti* and *Grosso*[132] and, three years later, in *Mackey v. United States*.[133] In the *Marchetti* cases Justice Brennan asserted that the decisions did not imperil legitimate governmental interests in obtaining information. "The privilege against self-incrimination does not bar the Government from establishing every program or scheme featured by provisions designed to secure information from citizens to accomplish proper legislative purposes."[134] *Sullivan* provided an example of a legitimate governmental program serving legitimate interests.[135] *Albertson, Marchetti,* and *Grosso,* however, were examples of governmental schemes created for "the purpose of gathering information from citizens in order to secure their conviction of crime."[136]

Justice Brennan's concern for the governmental interests implicated by a claim of the privilege is most evident in *Mackey*. Mackey was convicted of income tax evasion, partly on evidence of the income statement

127. 402 U.S. at 460 (Black, J., dissenting) (footnote omitted).
128. 402 U.S. at 469 (Brennan, J., dissenting).
129. *Id.* (citations omitted).
130. *Id.* at 469-70.
131. *Id.* at 476.
132. 390 U.S. 62, 72 (Brennan, J., concurring).
133. 401 U.S. 667, 702 (1971) (Brennan, J., with whom Marshall, J., joined, concurring in the judgment).
134. 390 U.S. at 72.
135. *Id.* at 73.
136. *Id.*

contained in his federal wagering tax return. His conviction became final before the *Marchetti* cases were decided. The Court rejected his argument that the wagering return had been erroneously received in evidence because under *Marchetti* and *Grosso* it constituted compelled self-incrimination. Seven justices found the dispositive issue to be whether *Marchetti* applied retroactively to *Mackey;*[137] Justice Brennan, joined by Justice Marshall, found that *Marchetti* did not even apply to Mackey's claim.[138]

Central to Justice Brennan's analysis was the premise that the wagering tax served "dual" purposes: the prosecutorial purpose of exposing illegal gambling and the taxing purpose of raising revenue.[139] The revenue interest was a legitimate purpose in light of the privilege:

> [W]hile the Government may not undertake the prosecution of crime by inquiring of individuals what criminal acts they have lately planned or committed, it may surround a taxing or regulatory scheme with reporting requirements designed to insure compliance with the scheme. . . . In the latter situation, the privilege may not be claimed if the danger of incrimination is only that the information required may show a violation of the taxing or regulatory scheme.[140]

The wagering return, by requiring a supplemental reporting of income,[141] served the important interests of the federal income tax system: "[H]ere the Government was entitled to demand the information that petitioner supplied—his gross income from wagering—in order to enforce the tax laws."[142] In addition, the prosecutorial purpose condemned in the *Marchetti* cases did not taint *Mackey*. The prosecution in *Mackey* was for violation of the federal income tax laws, not for violation of the wagering tax laws.[143]

The Court's decision in *California v. Byers*[144] demonstrates the role of the affected governmental interests in the substantive analysis of the presentation requirement. All but one justice considered the state's interests as a factor in the self-incrimination analysis.[145] Although the plural-

137. 401 U.S. at 667-75 (plurality opinion); *id.* at 675-702 (Harlan, J., concurring in the judgment); *id.* at 713-14 (Douglas, J., with whom Black, J., concurred, dissenting).

138. *Id.* at 709.

139. *Id.* at 707.

140. *Id.* at 707-08 (citations omitted).

141. *Id.* at 710.

142. *Id.* at 711.

143. *Id.* at 710.

144. 402 U.S. 424 (1971); *see supra* notes 116-131 and accompanying text.

145. Justice Black was the only member of the *Byers* Court to reject any consideration of the weight of the governmental interests in determining whether the privilege protected Byers from complying with California's hit and run law. 402 U.S. at 459 (Black, J., dissenting). Justice Black feared that a balancing analysis would inevitably dilute the protection of the privilege. *Id.* at 463.

California's asserted interests in *Byers* were its interests (1) in deterring antisocial behavior by criminal sanctions, 402 U.S. at 451 (Harlan, J., concurring in the judgment), (2) in

ity ruled that California's hit and run statute did not implicate the privilege against self-incrimination,[146] it also weighed the governmental interests against the interests of the privilege.[147]

Justices Brennan and Harlan clearly weighed the state's interests against the policies of the privilege, but they came to opposite conclusions regarding the proper result of the analysis. Justice Brennan balanced what he perceived to be the strong inference of criminal liability[148] against the state's interest in criminal law enforcement and its legitimate but weak interest in providing "information 'sought by a private party wholly for purposes of resolving a private dispute.' "[149] California's noncriminal interests with respect to the hit and run statute were, according to Justice Brennan, no different from the state's interests in pretrial discovery in the ordinary civil context.[150] He did not recognize an independent state interest in maintaining a system of personal financial responsibility as part of its regulation of driving. In Justice Brennan's view, California's interests did not justify the incrimination required by the statute.

Justice Harlan, however, concurred in the plurality's judgment precisely because the state's interests outweighed the implicated policies of the privilege. In a clear enunciation of the substantive view, Justice Harlan stated:

> The question whether some sort of immunity is required as a condition of compelled self-reporting inescapably requires an evaluation of the assertedly noncriminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the nature of the disclosures required.[151]

Justice Harlan's analysis considered separately the state's interest in enforcing its criminal laws against illegal driving,[152] its interest in maintaining a system of personal financial responsibility for automobile accidents,[153] and the necessity of self-reporting in effecting both interests.[154] Although the state's criminal law enforcement interest generally should

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maintaining a system of personal financial responsibility for automobile accidents, *id.* at 448, and (3) in using self-reporting to enforce the system of personal financial responsibility. *Id.*

146. *See supra* notes 119-121 and accompanying text.

147. 402 U.S. at 431 (plurality opinion) ("Furthermore, the statutory purpose is noncriminal and self-reporting is indispensable to its fulfillment.").

148. 402 U.S. at 470 (Brennan, J., dissenting) ("It is hard to imagine a record demonstrating a more substantial hazard of self-incrimination than this.").

149. *Id.* at 476 (quoting 402 U.S. at 450 (Harlan, J., concurring)).

150. *Id.*

151. *Id.* at 454 (Harlan, J., concurring in the judgment) (citing Mansfield, *supra* note 2, at 128-60).

152. 402 U.S. at 454.

153. *Id.* at 448.

154. *Id.*

not weigh heavily against the privilege,[155] Justice Harlan viewed this interest as "significantly served by imposition of criminal sanctions in the very cases where the feared results of dangerous driving have actually materialized."[156] California's regulatory interest in its system of personal financial responsibility for automobile accidents also weighed heavily.[157] Moreover, the use of self-reporting was almost indispensable to implementing both interests.[158]

Against these state interests Justice Harlan considered the implicated self-incrimination interests. Although the privilege was clearly implicated by the hit and run statute,[159] the intrusion did not violate the privilege to the extent that the schemes in *Marchetti* and *Grosso* had.[160] In these circumstances Justice Harlan concluded that

> [I]t [does] not follow that the constitutional values protected by the [policies of the privilege] are of such overriding significance that they compel substantial sacrifices in the efficient pursuit of other governmental objectives in all situations where the pursuit of those objectives requires the disclosure of information which will undoubtedly significantly aid in criminal law enforcement.[161]

The validity of a claim of the privilege should not rest solely on the importance of the affected governmental interest. Such a principle, taken to its logical extreme, would destroy the privilege completely.[162] Yet there is strong appeal in the notion that government should have the

155. *See Grosso,* 390 U.S. 72, 73 (1968) (Brennan, J., concurring) ("[W]e know that where the governmental scheme clearly evidences the purpose of gathering information from citizens in order to secure their conviction of crime, it contravenes the privilege.").

156. 402 U.S. at 447-48 (Harlan, J., concurring).

157. *Id.* at 440.

158. "[C]ompelled self-reporting is a necessary part of an effective scheme of assuring personal financial responsibility for automobile accidents. Undoubtedly, it can be argued that self-reporting is at least as necessary to an effective scheme of criminal law enforcement in this area." *Id.* at 448.

159. *Id.* at 450-51.

160. *Id.* at 457-58:

> California's decision to compel Byers to stop after his accident and identify himself will not relieve the State of the duty to determine, entirely by virtue of its own investigation after the coerced stop, whether or not any aspect of Byers' behavior was criminal. Nor will it relieve the State of the duty to determine whether the accident which Byers was forced to admit involvement in was proximately related to the aspect of his driving behavior thought to be criminal. In short, Byers having once focused attention on himself as an accident participant, the State must still bear the burden of making the main evidentiary case against Byers as a violator of . . . the California Vehicle Code. To characterize this burden as a merely ritualistic confirmation of the "conviction" secured through compliance with the reporting requirement in issue would be a gross distortion of reality; on the other hand, that characterization of the evidentiary burden remaining on the State and Federal Governments after compliance with the regulatory scheme involved in *Marchetti* and *Grosso* seems proper.

(footnotes omitted).

161. *Id.* at 448.

162. *See* Mansfield, *supra* note 2, at 148-49.

right to compel even self-incriminatory information to aid it in attaining nonprosecutorial ends.[163] Every successful assertion of the privilege frustrates some governmental information goal; the more important the frustrated interest, the more difficult it is to justify the loss of the information because of the claim of privilege. Accordingly, an analysis and appreciation of the threatened governmental interest appears to lie at the core of any decision to permit a claim of the privilege.[164]

III. The Reemergence of the Procedural View

A. *Garner v. United States*

In the six years between *Leary* and the 1975 Term, the composition of the Court changed dramatically.[165] In *Garner v. United States,*[166] it became apparent that the Court's approach to the *Sullivan* presentation rule had changed also. Garner sought reversal of his federal conviction for conspiracy to fix horse races and to engage in illegal gambling. The government's evidence at trial included several of Garner's federal income tax returns, which listed his occupation as "professional gambler."[167] He did not assert the privilege against use of this information until trial. The Court held that Garner, by voluntarily disclosing information in the return when he could have claimed the privilege, had not been compelled to incriminate himself.[168] Relying on *Mackey,* Garner argued that his fifth amendment objection at trial was sufficient to preserve the privilege even though he had not claimed it in the return.[169] In rejecting this argument, the Court took the opportunity to address the tangential issue of the presentation requirement in the *Marchetti* cases.

The Court first noted the general proposition that a witness loses the privilege against self-incrimination if he discloses information in his testimony instead of claiming the privilege.[170] Compulsion by subpoena to testify as a witness does not constitute prohibited compulsion under the Fifth Amendment; accordingly, testimonial disclosures are viewed as "voluntary."[171] The Court then assumed that "[t]he information revealed in the preparation and filing of an income tax return is, for pur-

163. *See id.* at 146.

164. *See id.* at 146-51.

165. Chief Justice Burger and Justices Blackmun, Powell, Rehnquist, and Stevens had replaced Chief Justice Warren and Justices Black, Douglas, Harlan, and Fortas.

166. 424 U.S. 648 (1976).

167. *Id.* at 649-50.

168. *Id.* at 665.

169. *Id.* at 658-59.

170. *Id.* at 653-54.

171. *Id.* at 654. The Court drew on its statement that "[t]he Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him." United States v. Monia, 317 U.S. 424, 427 (1943).

poses of Fifth Amendment analysis, the testimony of a 'witness.' "[172] Against this background, the Court turned in a footnote to the presentation requirement:

> [T]he privilege is an exception to the general principle that the Government has the right to everyone's testimony. A corollary to that principle is that the claim of privilege ordinarily must be presented to a "tribunal" for evaluation at the time disclosures are initially sought. . . . This early evaluation of claims allows the Government to compel evidence if the claim is invalid or if immunity is granted and therefore assures that the Government obtains all the information to which it is entitled.[173]

For the first time the Court offered a rationale for the *Sullivan* presentation requirement. The importance of the government's informational interest requires that it receive all the information it is due, except that which the privilege encompasses. The presentation requirement serves this end by enabling the government to establish the validity of any claim and to decide whether to extend immunity to the claimant in order to obtain information over a valid assertion.[174] This rationale also derives support from the parties' relative abilities to know whether a response may incriminate. Ordinarily "[o]nly the witness knows whether the apparently innocent disclosure sought may incriminate him, and the burden appropriately lies with him to make a timely assertion of the privilege."[175]

The *Garner* Court next offered an explanation for the *Marchetti* cases. Because presentation of the claim there would have itself incriminated the claimants, "[t]he Court therefore forgave the usual requirement that the claim of privilege be presented for evaluation in favor of a 'claim' by silence."[176] The Court then concluded that Garner did not come within the scope of the *Marchetti* cases: "Garner is differently situated. Although he disclosed himself to be a gambler, federal income tax returns are not directed at those ' "inherently suspect of criminal activities." ' . . . The requirement that such returns be completed and filed simply does not involve the compulsion to incriminate . . . ."[177]

The Court's reasoning in *Garner* reveals a procedural approach to the presentation issue. The privilege is properly asserted only if the claim was presented for evaluation when disclosure was sought. This requirement is "forgiven" in a particular class of cases in which presentation

172. 424 U.S. at 656.

173. *Id.* at 658 n.11 (citations omitted).

174. The federal government may grant immunity from prosecution under 18 U.S.C. § 6002 (1982).

175. 424 U.S. at 655.

176. *Id.* at 658 n.11. The claim, however, still must be valid. If it is found that the privilege does not protect against the disclosures sought, the government may compel the information. *Id.*

177. *Id.* at 660-61 (quoting Marchetti v. United States, 390 U.S. 39, 52 (1968)).

itself incriminates the claimant. Because Garner did not fall into the excepted class, he failed to satisfy the presentation requirement. The Court did not consider that some larger rationalizing principle underlies the *Marchetti* cases and may apply also in *Garner*. Instead, the Court read the *Marchetti* decisions as constituting a narrow, factually based exception to the general rule requiring presentation.

B. *Minnesota v. Murphy*

In the 1983 Term, the Court addressed the presentation requirement twice. In *Minnesota v. Murphy*,[178] the defendant had been suspected of a murder, but was never charged. Later, after conviction for a different crime, he confessed to his parole officer that he had committed the murder. He did not assert the privilege against self-incrimination until trial. The Minnesota Supreme Court reversed Murphy's murder conviction on the basis of *Miranda v. Arizona*[179] because the probation officer had failed to inform Murphy of his right to claim the privilege.[180] The Court reversed, finding Murphy's claim to be outside the three "well-defined" situations,[181] including the *Marchetti* decisions, in which the privilege protects an individual despite his failure to assert it when incriminating disclosures are made.[182]

The Court addressed the *Marchetti* cases in dicta. Murphy could not claim the benefit of the claim by silence because, unlike the taxpayer who "necessarily identifies himself as a gambler"[183] by presenting a claim of privilege in a wagering tax return, Murphy's identity as a murder suspect was known to the authorities before the inquiries were made. Thus, Murphy would not have exposed himself by claiming the privilege.[184]

Murphy strongly affirmed *Garner* and the procedural view in presentation cases. The *Marchetti* cases were relevant to the Court's analysis only insofar as they represented an exception to "the requirement that the claim be presented for evaluation in a timely manner."[185] These cases stood for the proposition that "the privilege may be exercised by

178. 465 U.S. 420 (1984).

179. 384 U.S. 436 (1966).

180. 465 U.S. at 425.

181. *Id.* at 429.

182. *Id.* at 429-40. The other situations were the custodial interrogation cases, *see, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966), and the economic coercion cases, *see, e.g.*, Garrity v. New Jersey, 385 U.S. 493 (1967).

183. 465 U.S. at 439. This statement might be construed to characterize the *Marchetti* analysis as requiring a necessary implication of criminal activities by the claimant. This, however, would be a serious misinterpretation of the *Marchetti* analysis, which requires only an implication of membership in a class of persons highly suspect of criminal activites. *See supra* text accompanying notes 108-109.

184. *Id.*

185. *Id.* (footnote omitted).

failing to file"[186] required reports when the filing itself would be incriminating.[187]

C. *Selective Service System v. Minnesota Public Interest Research Group*

In *Selective Service System v. Minnesota Public Interest Research Group,*[188] the Court reversed a district court's holding[189] that the privilege prevented Congress from conditioning eligibility for federal post-secondary student financial aid on the aid applicant's having certified his draft registration status.[190] In order to encourage compliance with the draft registration law, Congress enacted section 1113 of the Department of Defense Authorization Act of 1983,[191] which required college and graduate student financial aid applicants to declare whether they had registered, or, if they were exempt from registration, to specify the applicable exemption. An application would be considered for aid only if the certification were completed.[192] By conditioning aid eligibility on certification, section 1113 provided an incentive to register for the draft. Section 1113 did not differentiate between timely and untimely registration, despite the fact that the presidential proclamation imposing registration

186. *Id.*

187. The Court supported this procedural approach by relying on its footnote in *Garner,* which defined the procedural view: "[M]aking a claim of privilege when the disclosures were requested, *i.e.,* when the returns were due, would have identified the claimant as a gambler. The Court therefore forgave the usual requirement that the claim of privilege be presented for evaluation in favor of a 'claim' by silence .... If a particular gambler would not have incriminated himself by filing the tax returns, the privilege would not justify a failure to file." Minnesota v. Murphy, 465 U.S. at 439 (quoting Garner v. United States, 424 U.S. 648, 658 n.11 (1976)).

In describing the doctrine of the claim by silence, the *Murphy* Court apparently misstated the circumstances giving rise to the *Marchetti* decisions. It stated: "In recognition of the pervasive criminal regulation of gambling activities and the fact that claiming the privilege *in lieu of filing* a return would tend to incriminate, the Court has held that the privilege may be exercised by failing to file." *Id.* (citing Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968)) (emphasis supplied). *Marchetti* and *Grosso,* however, were manifestly not situations in which the government argued that the petitioners should have claimed the privilege in lieu of filing the return; rather, the government contended that the privilege should be asserted in the return itself. *Marchetti,* 390 U.S. at 50-54; *Grosso,* 390 U.S. at 64-67. *See* United States v. Sullivan, 274 U.S. at 264 (defendant "should have tested [the claim of privilege] in the return so that it could be passed upon."). *See also Kahriger,* 345 U.S. at 32. Reliance on this misstatement could have the deleterious effect of confusing the *Marchetti* analysis. That analysis presumes that the alternative to failure to file is claiming the privilege *in* the return itself. *See, e.g., Sullivan,* 274 U.S. at 263. It is the connection between the assertion of the privilege and the report that creates incrimination in the *Marchetti* analysis.

188. 104 S. Ct. 3348 (1984).

189. Doe v. Selective Serv. Sys., 557 F. Supp. 937 (D. Minn. 1983).

190. The aid program exists under Title IV of the Higher Education Act of 1965, codified at 20 U.S.C. §§ 1070-89 (1982).

191. Military Selective Service Act, 50 U.S.C. app. § 462(f) (1982).

192. *See* 34 C.F.R. § 668.25 (1983).

required men to register within thirty days of their eighteenth birthday, and late registration carried criminal penalties.[193] Thus, section 1113 urged even untimely registration.

The United States District Court for the District of Minnesota enjoined the Selective Service System from enforcing the statute, holding that the plaintiffs[194] had demonstrated a strong probability that they would succeed on the merits in their bill of attainder and fifth amendment challenges to section 1113.[195] The court held that section 1113 probably violated the privilege against self-incrimination because it forced nonregistrants to

> identify themselves in the . . . aid application process as nonregistrants under the Selective Service System's registration requirements. The law allows this information to be provided to the Director of the Selective Service System and directs that the Director work with the Secretary of Education to verify compliance statements. . . . [I]t appears that the Service expects to implement soon an "active" enforcement program based on access to Social Security records. . . . It takes no great stretch of the imagination to discern how plaintiffs' identification of themselves as nonregistrants could incriminate them or provide a significant link in the

193. Presidential Proclamation No. 4771, 3 C.F.R. 82 (1982).

194. The plaintiffs sued under the fictious names of John Doe, Richard Roe, Paul Poe, Bradley Boe, Carl Coe and Frank Foe. Each was a male resident of Minnesota between the ages of nineteen and twenty-one who (1) intended to apply for federal postsecondary financial aid, (2) could not complete his education without financial aid, and (3) could not comply truthfully with the certification requirement under Section 1113. *Doe,* 557 F. Supp. at 938. Doe, Roe and Poe had intervened in an action filed originally by the Minnesota Public Interest Research Group (MPIRG), which was a Minnesota nonprofit corporation directed by students. Minnesota Pub. Interest Research Group v. Selective Serv. Sys., 557 F. Supp. 923 (D. Minn. 1983). The court had granted summary judgment against MPIRG on the ground that it lacked standing. 557 F. Supp. at 925. The court then informally consolidated the two actions for decision on the motion for preliminary injunction. *Doe,* 557 F. Supp. at 938; *see also Selective Serv. Sys.,* 104 S. Ct. at 3352.

195. The court entered a preliminary injunction on March 10, 1983. The injunction was made permanent on June 16, 1983. *Selective Serv. Sys.,* 104 S. Ct. at 3352. The Supreme Court stayed the injunction pending appeal on June 29, 1983. Selective Serv. Sys. v. Doe, 463 U.S. 1215 (1983).

On the bill of attainder analysis, the district court found that Section 1113 singled out an identifiable group based on past conduct—failure to register, legislatively determined their guilt, and punished them by denying them financial aid, which deprived them of the practical means to pursue their educations. *Doe,* 557 F. Supp. at 942-46. On appeal the Supreme Court reversed, holding that Section 1113 did not constitute a Bill of Attainder, because properly construed, it did not specify an ascertainable group, and it was not punitive in nature. 104 S. Ct. at 3353-58. For analysis of the bill of attainder issue in *Selective Serv. Sys., see* Comment, *Conditioning Financial Aid on Draft Registration: A Bill of Attainder and Fifth Amendment Analysis,* 84 COLUM. L. REV. 775, 776-95 (1984) [hereinafter cited as *Conditioning Financial Aid*]; Comment, *Doe v. Selective Service System: The Constitutionality of Conditioning Student Financial Assistance on Draft Registration,* 68 MINN. L. REV. 677, 680-702 (1984) [hereinafter cited as *Constitutionality*].

chain of evidence tending to establish their guilt.[196]

The Supreme Court restricted its review to determining whether conditioning aid eligibility on draft registration certification constituted impermissible compulsion[197] and whether the nonregistrants, who had never presented a claim of privilege to the government, had properly asserted the privilege.[198] Only the latter issue, by possibly requiring the unmasking of anonymous, criminally liable persons, involved a *Marchetti* question: presentation of a claim of privilege arguably could incriminate a late registrant who sought to comply with the certification requirement.

Selective Service System contained two self-incrimination issues, one relating to each of the government's required reports. The financial aid application requested certification of the applicant's status as either registered for the draft or exempt from registration. The Court failed to consider the aid application in its fifth amendment analysis. Because an incomplete certification presumably would have rendered an applicant ineligible for aid, arguably no one would file an application with an incomplete certification.[199] Even if some persons were to file applications with incomplete certifications, creating at least a slight inference of nonregistration, this incriminating inference would not rise to the level of the inferences in the *Marchetti* cases. Here, persons required to file the certification were college and graduate students, a class of persons not highly suspected of criminal activities. Thus, unlike the *Marchetti* decisions, the mere applicability of the certification's reporting requirement did not identify an applicant as a member of a class of likely criminals. In dissent, Justice Marshall confirmed the conclusion that the application was nonincriminating: "[T]he Title IV application process itself does not require a student to divulge incriminating information . . . . The neutrality of this compliance verification system is central to the majority's acceptance of the permissible, regulatory purpose of the statute."[200]

The Court's fifth amendment analysis focused on the draft registration form itself. Assuming that conditioning financial aid eligibility compelled registration,[201] the registration form, which required a registrant

196. *Doe,* 557 F. Supp. at 948 (footnote and citation omitted).

197. 104 S. Ct. at 3358. The Court stated that the economic coercion involved in conditioning financial aid eligibility on draft registration did not constitute impermissible compulsion under the Fifth Amendment. *Id.* For a brief critique of this analysis, *see infra* note 201.

198. 104 S. Ct. at 3358-59.

199. The Court stated: "Since a nonregistrant is bound to know that his application for federal aid would be denied, he is in no sense under any 'compulsion' to seek that aid. He has no reason to make any statement to anyone as to whether or not he has registered." 104 S. Ct. at 3358.

200. *Selective Serv. Sys.,* 104 S. Ct. at 3363-64 (Marshall, J., dissenting).

201. The Court concluded that the conditional aid eligibility did not constitute compulsion within the meaning of the privilege. 104 S. Ct. at 3358. This determination is debatable. *Compare* Comment, *Constitutionality, supra* note 195, at 707-09 (denial of student aid is not coercive because student can "escape" the sanction by registering and because any coercion

to provide his name, birthdate and date of registration,[202] sought potentially incriminating information that implicated the privilege. Each piece of information was a crucial element in a prosecution for late registration or nonregistration.[203]

Because the registration form was directed exclusively at the class of men required to register, any compliance with the registration form necessarily would identify a person as a member of that class. This certainly could be incriminating to late registrants or nonregistrants, especially because a primary problem in enforcing the draft registration law was determining who was required to register.[204] Claiming the privilege on the registration form would identify the claimant as subject to the registration requirement and expose him to an increased risk of prosecution. Like identification as a gambler, identification as a draft-age male significantly eases the prosecutor's investigatory burden. The inquiry becomes whether the identified person has registered within the prescribed time, not whether he must register at all. Combined with the economic compulsion of the threat to withhold financial aid, the draft registration statute implicated the interests protected by the privilege against self-incrimination.[205]

An analyis under the substantive view would balance the substantiality of the risk of incrimination against the affected governmental interests. The government has an important, perhaps "compelling,"[206] interest in draft registration to meet the legitimate end of providing for national security. The information requested by the registration form is reasonably necessary to achieving this end. Weighing with the governmental interest is the consideration that, although a claim of the privilege would create an incriminating inference, the registration statute is fundamentally different from the statutory scheme in the *Marchetti* cases.

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requires registration rather than revelation of noncompliance) *with* Comment, *Conditioning Financial Aid, supra* note 195, at 799-800 ("denial of student aid clearly [constitutes] 'substantial economic coercion' ").

202. 32 C.F.R. § 1615.4 (1983).

203. Prosecution under the Military Selective Service Act requires the government to prove (1) the defendant's date of birth, (2) his failure to register within eighteen years and thirty days of his date of birth, and (3) his knowledge of his duty to register. 50 U.S.C. app. § 462(a) (1982). *See Selective Serv. Sys.*, 104 S. Ct. at 3364 (Marshall, J., dissenting). The draft registration form itself provides the first two elements, leaving only the third element for the prosecution to show. *Id.* More importantly, however, the registration form *identifies* draft-age males to the government, which overcomes the most difficult obstacle to enforcing registration. *Id.* at 3366 n.18 ("[N]onregistrants are not known to the Government. Therefore, invocation of the Fifth Amendment by appellees gives the Government a different quality of information.").

204. *Oversight Hearing on Selective Service Prosecutions Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,* 97th Cong., 2d Sess. 10 (1982).

205. *See* Comment, *Conditioning Financial Aid, supra* note 195, at 795-805.

206. *Selective Serv. Sys.*, 104 S. Ct. at 3360 (Powell, J., concurring).

Those statutes were designed to expose activity that was illegal under state law. The draft registration statute, however, combined with the financial aid certification, were designed to induce manifestly legal conduct—registration for the draft. To this extent the two arguably are distinguishable. This distinction, however, does not insulate *Selective Service System* from the *Marchetti* analysis. First, the argument that the aid certification compelled registration rather than exposure of likely criminal conduct is simply misleading. For those who were exempt from registration or who had fulfilled their duty to register, there was no risk of incrimination. But for those who had not registered within thirty days of their eighteenth birthday, the statute coerced a revelation of criminal activity. Late registration was punished just as heavily as noncompliance under the statute.[207] Thus the registration statute fell squarely within the ambit of the *Marchetti* cases.[208] Second, and more important, the *Marchetti* analysis does not depend on the nature of the conduct compelled; rather, it turns on the existence of an incriminating inference. If the government coerces an individual to file a report in circumstances in which a claim of the privilege would reveal the claimant to be a member of a class of persons highly suspect of criminal activity, the *Marchetti* analysis is fully applicable.

If the Court had used the substantive analysis of the claim by silence in *Selective Service System,* the result could have gone either way. The substantial risk of incrimination faced by late registrants may have been offset by the government's concededly strong interest in draft registration to provide for national security. The Supreme Court's ground for decision in *Selective Service System* was, however, unclear. With respect to the claim of incrimination, the Court stated:

> None of these appellees has registered and thus none of them has been confronted with a need to assert a Fifth Amendment privilege . . . .
>
> . . . Under these circumstances, section 1113 does not violate their Fifth Amendment rights by forcing them to acknowledge during the registration process they have avoided that they have registered late.[209]

The Court may have conducted a ripeness analysis similar to that in *Communist Party,* in which the Court ruled that because the litigants had failed to satisfy every condition precedent to the existence of their duty to

207. 50 U.S.C. app. § 462(a) (1982).

208. *See Selective Serv. Sys.,* 104 S. Ct. at 3367 (Marshall, J., dissenting) ("Congress forged the link between education aid and Selective Service registration in order to bring into compliance with the law the 674,000 existing nonregistrants . . . . Although as a general matter it is correct to say that registration is like income tax . . ., Section 1113-compelled *late* registration is directed to a group inherently suspect of criminal activity, squarely presenting a *Marchetti* issue.").

209. 104 S. Ct. at 3358-59 (footnote omitted).

register, no opportunity to claim the privilege arose.[210] The premise of the ripeness analysis is that the duty to register does not apply. Here, however, the draft registration obligation clearly fell on the appellees, so a ripeness analysis would be misplaced.[211]

Alternatively, the Court may have rested its decision on the ground that the privilege was not properly asserted. The appellees had neither presented their claim of the privilege to the government nor attempted any compliance with the registration form. On this issue the Court refused to find an exception to the presentation rule and apparently found that, because the privilege was asserted improperly, section 1113 did not violate the appellees' fifth amendment rights. In a footnote, the Court distinguished the *Marchetti* cases on their facts: "In *Marchetti* and *Grosso,* however, anyone who asserted the privilege on a wagering return did not merely call attention to himself; the very filing necessarily admitted illegal gambling activity."[212] The appellees' self-incrimination claim in *Selective Service System* may have failed under either the procedural or the substantive view. Yet the Court appeared again to take the procedural view, casting the *Marchetti* cases in *Garner* terms: "The dissent reads [the *Marchetti* cases] to create in this case an exception to the normal rule requiring assertion of the Fifth Amendment privilege."[213]

Beyond its apparent affirmation of the procedural view, the Court in *Selective Service System* appeared to read the *Marchetti* cases as requiring a necessary admission of illegal activities before the exception lies to the procedural rule.[214] In the *Marchetti* cases, however, the incriminating inference was not a necessary admission of illegal activities, but rather a necessary inference of membership in a highly suspect class of persons. The difference is significant because to require a necessary inference of illegal activites would severely restrict the *Marchetti* analysis.

IV. A Comparison of the Substantive and Procedural Views

The *Garner* Court's characterization of the *Marchetti* cases as creating a "claim" of the privilege by silence suggests that it viewed those cases as establishing an alternative manner of asserting the privilege. Yet the proposition that the privilege can be asserted by silence suffers from conceptual difficulties. By its nature silence is ambiguous.[215] A person may fail to file a required report for various reasons, which may not include a desire to avoid incrimination. For instance, the taxpayers in the

210. *See supra* notes 43-46 and accompanying text.

211. Each appellee was more than eighteen years and one month old. *See supra* note 194.

212. *Selective Serv. Sys.,* 104 S. Ct. at 3359 n.16.

213. *Id.*

214. *Id.*

215. Silence may be less ambiguous in the context of a duty to speak. *See* Greenawalt, *Silence as a Moral and Constitutional Right,* 23 WM. & MARY L. REV. 15 (1981).

Marchetti cases may have wished to avoid paying taxes, rather than to avoid incrimination. Other modes of asserting the privilege, such as *Sullivan* presentation, clearly reveal an intent to gain the benefits of the privilege. However, because it is never evident whether a person who maintains silence intends to claim the privilege, it is misleading to analyze the *Marchetti* rule as a claim or affirmative assertion of the privilege.

The *Marchetti* Court did not view itself as inventing a new procedural rule for asserting the privilege. Instead, it determined that asserting the privilege was *not necessary* to obtain the protection of the Fifth Amendment.[216] Indeed, the Court's concern in the *Marchetti* cases was not with the procedural details involved in a proper claim of privilege, but with the proper result in a prosecution for failure to undertake an incriminating action.[217] Accordingly, the *Marchetti* cases are instances in which the Court conducted a substantive balancing judgment that weighed in favor of extending the privilege to certain persons regardless of whether they actually asserted it. In these cases, the privilege provides a defense to the prosecutions. The defense applies whenever the importance of the particular governmental information interest cannot justify the intrusion into the privilege. Assertion of a claim is not necessary to obtain the benefit of the privilege when assertion itself involves substantial risk of incrimination.

Analytically, the substantive view is preferable to the procedural view because the substantive view balances the implicated governmental interests directly against the privilege without the distraction of an irrelevant procedural consideration. The competing interests can be scrutinized fully in light of the facts of each case. The weights of the risk of incrimination and of the governmental interests receive primary consideration. These factors should govern specific applications of the privilege and should not be buried beneath the bare formalism of the procedural view when a presentation problem is at issue.

In addition, under the substantive view the scope of the privilege assumes contours that vary according to the relative importance of the governmental interests and the substantiality of incrimination in each case. Although this result makes the application of the privilege more complex, complexity may be a small price to pay to achieve a greater

216. The *Marchetti* Court stated: "In these circumstances, we cannot conclude that [petitioner's] failure to assert the privilege to Treasury officials at the moment the tax payments were due irretrievably abandoned his constitutional protection. Petitioner is under sentence for violation of statutory requirements which he consistently asserted at and after trial to be unconstitutional; no more can here be required." 390 U.S. at 50-51.

217. In *Leary* the Court stated: "The aspect of the self-incrimination privilege which was involved in *Marchetti,* and which petitioner asserts here, is . . . the right not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act. Thus, petitioner is . . . asserting . . . that he cannot be convicted for having failed to comply with the transfer provisions of the Act at the time he acquired marihuana in 1965." 395 U.S. at 28.

rationality in self-incrimination jurisprudence. The privilege against self-incrimination is a fundamentally complex principle. As Justice Harlan observed:

> The Constitution contains no formulae with which we can calculate the areas within th[e] 'full scope' to which the privilege should extend . . . . [T]he Court has chiefly derived its standards from consideration of two factors: the history and purposes of the privilege, and the character and urgency of other public interests involved.[218]

Whenever the government imposes a duty to disclose information and permits an exception to the duty only when the disclosure may incriminate, the act of claiming the exception necessarily creates an incriminating inference.[219] Under the Supreme Court's decisions, an individual ordinarily must incriminate himself to some extent by asserting the privilege in order to gain its benefits.[220] But at some point, merely claiming the privilege gives rise to so substantial an incriminating inference that affirmatively asserting the privilege becomes unnecessary. Any adequate account of the privilege must provide an explanatory principle for this phenomenon.

The procedural view presents a weak response to this problem. It attempts to ground the claim by silence solely on the incriminating effect of presentation in the *Marchetti* cases[221] and denies the existence of the risk of incrimination present in *Sullivan*.[222] Nor can the procedural analysis adequately account for the different results in *Sullivan* and in the *Marchetti* cases. Under the procedural view those cases are either distinguishable because presentation in *Sullivan* involved no incrimination, which appears false, or they are simply inconsistent decisions. The substantive view encounters no such difficulty. It brings two additional considerations to the analysis of the presentation issue: the government's interest and the substantiality of the incriminating inference. These additional factors provide ample grounds for distinguishing *Sullivan* from *Marchetti*[223] and for responding to the larger problem of explaining the permissible incrimination inherent in any presentation requirement relating to the privilege.

The substantive view is superior to the procedural view for additional reasons. In some cases the government's need for information may

218. Spevack v. Klein, 385 U.S. 511, 522-23 (1967) (Harlan, J., dissenting).

219. *See* Mansfield, *supra* note 2, at 118.

220. *Id.* at 117.

221. The procedural view bases the *Marchetti* exception to the presentation requirement on the reasoning that "[s]ince submitting a claim of privilege in lieu of the . . . [disclosure] would incriminate, . . . the privilege could be exercised by simply failing to file." Garner v. United States, 424 U.S. 648, 658 (1976).

222. *See supra* text accompanying notes 20-25.

223. *See supra* text accompanying notes 110-164.

be so great that otherwise impermissible compulsion of incriminating information becomes necessary.[224] The substantive view could permit such compulsion when the government's interests clearly justified it.[225] By contrast, the procedural view would prevent the government's use of a reporting mechanism similar to those involved in the *Marchetti* decisions.[226]

In addition, under the procedural view a person in a *Marchetti* situation need never present his claim of the privilege, even though presentation may lead to a grant of immunity from prosecution.[227] Thus the procedural view may unnecessarily deny important information to the government. By comparison, under the substantive view, presentation of the privilege is necessary even in a *Marchetti* case if the threatened governmental interests are sufficiently compelling. Thus, the substantive view of the presentation problem arguably makes more information available to the government than the procedural view.

Further, the justifiable failure to make required disclosures not only protects an individual from the threat of prosecution, but also shields him from the civil, social and personal exposure that otherwise would follow the disclosure.[228] The privilege protects only against the threat of criminal prosecution, with the result that it permits these additional sanctions. Not even a grant of prosecutorial immunity shields a person from these social pressures. Yet under the procedural view, the *Marchetti* cases shield a protected individual from these concomitant pressures by permitting him to remain silent. Thus no one knows of his activities. Although this may be desirable public policy, it has never been an aspect of the privilege against self-incrimination.

Moreover, the substantive view appropriately accords the privilege the stature of an express constitutional guarantee. The Fifth Amendment contains no presentation requirement. Yet under the procedural view, an individual's failure to meet the judicially created requirement of presentation defeats the privilege even in cases in which the policy of the privilege may be implicated most seriously, such as, for example, when

224. For instance, the government may require information during war time or times of national crisis.

225. The idea that the privilege may be subordinated to an overwhelming governmental interest is implicit in the balancing judgment conducted under the substantive view. *See* California v. Byers, 402 U.S. 424, 427 (1971) (plurality opinion). However, as a practical matter, given the availability of a grant of immunity from prosecution, 18 U.S.C. § 6002 (1982), the situation in which the government's compelling interest may require overriding of the privilege probably will never arise.

226. Moreover, the reasoning of the procedural view forecloses any argument that an individual's failure to comply with the reporting requirement *did not* constitute an attempt to invoke the privilege: the procedural view attributes a specific anti-incriminatory intent to individuals who fail to submit required information.

227. *See Garner,* 424 U.S. at 658 n.11, discussed *supra* at text accompanying notes 173-174.

228. Mansfield, *supra* note 2, at 107.

skillfully drawn legislation requires a select group to disclose incriminating information. By dispensing with procedural prerequisites, the substantive view fully recognizes the constitutional weight of the privilege.

The substantive view also prevents the imposition of unprincipled limitations on the scope of the privilege in cases involving the presentation requirement. One unprincipled limitation would be the restriction of the *Marchetti* rule to tax cases. Although the *Marchetti* cases involved taxation schemes, this is a factual setting that was incidental to the resulting rule, not an inherent limit on its scope. The *Marchetti* reasoning has been applied to nontax contexts by the Burger Court,[229] and *Marchetti*'s legal precedent, *Albertson,*[230] involved legislation designed to protect national security. The substantive view analyzes the *Marchetti* cases as stating a generally applicable rule that is not limited to tax cases.

Another possible limitation on the scope of the *Marchetti* analysis arises from a mistaken reading of the " 'inherently suspect' " class language in *Albertson* and the *Marchetti* cases.[231] "Inherently suspect of criminal activities" referred in those cases to the fact that the reporting requirement was directed exclusively to a class containing a large number of criminal violators.[232] The reports were incriminating because respondents necessarily identified themselves as members of the suspect class. Aside from a possible coincidence that the criminally suspect class might overlap with a group of morally suspect persons, there was no discernible connection between the "inherently suspect" class and moral depravity.

Yet, in *Field v. Brown,*[233] a panel of the District of Columbia Circuit Court of Appeals apparently thought otherwise. The court distinguished the *Marchetti* cases partly on the basis that "the retirees' reporting obligation is imposed upon all retired [military] officers, a distinguished and honorable class manifestly not a 'highly selective group inherently suspect of criminal activities.' "[234] If the *Field* court meant that the suspect class must be undistinguished or dishonorable for the Marchetti reasoning to apply, it seriously misread the law. Such a principle would create a significant restriction on the *Marchetti* precedents. The substantive view easily avoids this pitfall by focusing on the substantiality of the threat of criminal incrimination to the affected individual. This may turn

229. *E.g.,* United States v. Ward, 448 U.S. 242 (1980).

230. Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965), discussed *supra* at text accompanying notes 50-62.

231. *See Marchetti,* 390 U.S. at 47; *Albertson,* 382 U.S. at 79.

232. *See supra* notes 52-54, 81-83, 107-108 and accompanying text.

233. 610 F.2d 981 (D.C. Cir. 1979). The court in *Field* faced a fifth amendment challenge to a regulation requiring retired military officers working for defense contractors to report their military sales to the government in order to combat corruption in defense purchases. Because the claimants had not filed the required reports, a *Sullivan* presentation issue arose. *See id.* at 983 n.3.

234. *Id.* at 989 (quoting California v. Byers, 402 U.S. 424, 430 (1971)).

on whether he is a member of a criminally suspect class, but never on whether he is a member of a morally or socially dishonorable class.

Conclusion

Murphy and *Selective Service System* together signal a substantial narrowing of the *Marchetti* analysis. Both opinions view the presentation problem as a procedural issue and appear to represent a firm entrenchment of this view in the Court's fifth amendment jurisprudence. Moreover, language in both decisions suggests that the Court has engaged in selective rewriting of the *Marchetti* analysis in order to restrict it in application. These developments portend that affirmative presentation of a claim of the privilege against self-incrimination will be necessary in more cases than under the Warren Court's substantive analysis.

More importantly, the Court's recent decisions may presage a return to the rejected analysis of *Kahriger* and *Lewis*: the privilege may not prohibit the necessary exposure of individual members of particular legislatively defined classes of persons. Under that analysis, legislatures would be free to target classes of persons who engage in illegal conduct and subject them to highly selective compulsory registration requirements. Compliance would incriminate a person by necessarily identifying him as a member of the select, criminally suspect class required to register. Failure to register would subject the individual to forfeiture of any benefits conditioned on registration or to prosecution for failure to fulfill the legal duty to register. Failure to register also would invalidate a claim of the privilege against self-incrimination to prevent the revocation of benefits or as a defense in a resulting criminal prosecution.

Although the *Marchetti* decisions still stand, their analysis, which prevents highly selective reporting schemes in criminal contexts, appears substantially curtailed. The current Court apparently intends to restrict the precedential scope of the *Marchetti* cases and to glean a modified procedural analysis from them that in practice undermines the protection afforded by the privilege against self-incrimination.

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